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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN THE MATTER OF THE
THE EXTRADITION OF
PATRICK McCABE

No. CR 10-90622 MEJ

UNITED STATES' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The United States respectfully submits the following proposed findings of fact and conclusions of law. The United States reserves the right to amend, supplement, or modify these proposed findings and conclusions.

I. FINDINGS OF FACT

1. Patrick McCabe is an Irish national born September 12, 1935. He is 74 years old and lives in the Northern District of California at 866 ½ Walnut Street in Alameda, California.

2. Between October 2, 2009 and May 5, 2010, two Irish district courts issued a total of ten warrants for McCabe's arrest. The warrants indicate that McCabe is wanted on suspicion of nine counts of indecent assault and one count of attempted indecent assault. The

1 charges stem from the complaints of six men who allege that McCabe sexually assaulted
2 them between 1973 and 1981. During this time, McCabe was serving as a Catholic priest in
3 the Dublin Archdiocese. Irish prosecutors have investigated the complaints and concluded
4 that McCabe should be prosecuted for them.

5 3. The complainants are: Thomas Lawrence, who claims that he was between 11
6 and 13 years old when McCabe both assaulted and attempted to assault him; Andrew
7 Canavan, who claims that he was between 10 and 12 years old when McCabe assaulted him;
8 James Moran, who claims that he was 13 or 14 years old when McCabe assaulted him; Frank
9 LaCumbre, who claims that he was between 12 and 14 years old when McCabe assaulted
10 him; Barry Ennis, who claims that he was 11 years old when McCabe assaulted him; and
11 Anthony Corrigan, who claims that he was 11 years old when McCabe assaulted him.

12 4. McCabe perpetrated his last alleged assault in approximately March, 1981.

13 5. Irish police submitted their first allegations against McCabe to the Irish
14 Director of Public Prosecution in 1988. That year, McCabe left the Irish jurisdiction in
15 which charges had been lodged against him.

16 6. McCabe's location was unknown until 2003, when Interpol reported that he
17 was living at 955 Shore Point Court, Apartment 112 in Alameda, California.

18 7. Dr. William Sellman is a family practice physician and a member of the
19 Alameda Family Physicians practice group. He has served as McCabe's primary care
20 provider since 2007.

21 8. Dr. Sellman has diagnosed McCabe with type II diabetes, coronary artery
22 disease, peripheral vascular disease, high blood pressure, sciatica, and elevated prostate
23 specific antigen. For these conditions, McCabe takes a total of two medications and
24 monitors his blood sugar daily.

25 9. Alameda Family Physicians staff performed McCabe's most recent annual
26 physical on April 16, 2010. During that examination, McCabe indicated that he was
27 walking, biking, and practicing yoga four times per week. He also indicated that he had
28 begun practicing Chi-Gung, a full-body exercise. McCabe's physical revealed that he was in

1 no acute distress. His physician estimated that his prostate was of normal size and without
2 nodules or asymmetry.

3 10. A subsequent examination by Dr. Robert W. Kindrachuk, a urologist, found
4 that McCabe's prostate was small, slightly firm, and without nodularity. McCabe's PSA
5 count of 6.8 with a free PSA of 26%. Based on this exam and other tests, Dr. Kindrachuk
6 concluded on May 3, 2010 that McCabe's risk of prostate cancer was 9 percent. Dr.
7 Kindrachuk noted significant obstructive voiding complaints by McCabe which led to
8 frequent urination. He also noted that it was reasonable for McCabe to decline a needle
9 biopsy of his prostate for at least three months.

10 11. If McCabe were remanded pending his extradition, he would likely be housed
11 in the Santa Rita Jail in Dublin, California.

12 12. Dr. Harold W. Orr is the regional medical director of PHS Correctional Health
13 Care. In that role, he supervises clinical services at the Santa Rita Jail and the Glenn E. Dyer
14 Detention Facility ("Dyer").

15 13. Dr. Orr declared on August 3, 2010 that the Dyer facility had a fully-
16 functioning, 20 bed infirmary and medical personnel on call 24 hours a day, seven days a
17 week. He added that these personnel routinely provide care to inmates with cardiovascular
18 disease and with diabetes. Some of these inmates cope with type I diabetes, a more serious
19 condition than McCabe's requiring injections.

20 14. Dr. Orr further declared that he had briefly reviewed McCabe's medical
21 history and concluded that the Dyer facility would adequately meet McCabe's medical
22 needs. Dr. Orr added that the facility's medical staff are competent to administer McCabe's
23 prescribed medications and can tailor food service to accommodate his diabetes.

24 II. CONCLUSIONS OF LAW

25 1. There is an extradition treaty in force between the United States and Ireland.
26 Treaty on Extradition Between the United States of America and Ireland signed 13 July
27 1983, U.S.-Ir., July 14, 2005, S. TREATY DOC. NO. 109-14 (2006).

1 2. Pursuant to this treaty, the Government of Ireland has submitted a formal
2 request through diplomatic channels for the extradition of McCabe.

3 3. Article II, Section 1 of the Treaty states that an offense warrants extradition
4 “only if it is punishable under the law of both Contracting Parties by imprisonment of more
5 than one year, or by a more severe penalty.” This requirement is a standard feature of
6 extradition treaties and is commonly known as dual criminality. Its reach is further clarified
7 by Article II, Section 2, which provides that fugitives will remain subject to extradition even
8 when the parties use differing terminology to describe criminal conduct that both countries
9 prohibit.

10 4. In Ireland, indecent assault is an offense at Common Law. Irish courts define
11 an “assault” as an act by which one person intentionally or recklessly causes another to
12 apprehend immediate, unlawful personal violence. Irish courts interpret “violence” as any
13 unlawful touching of a person without his consent or a lawful excuse. Circumstances of
14 indecency are those capable of being considered by “right-minded persons.” In Ireland, if
15 the indecent assault occurred before June 6, 1981, its maximum penalty is 2 years
16 imprisonment for the first offense and 5 years imprisonment for a second or subsequent
17 offense.

18 5. United States statutes also outlaw the sexual assault of children. 18 U.S.C.
19 Sec. 2243 prohibits the sexual abuse of a minor. It defines this act as knowingly engaging in
20 a sexual act with another person who is at least 12 years old but who is not yet 16 years old.
21 Also, the perpetrator must be at least four years older than the victim. This crime is
22 punishable by a fine, 15 years in prison, or both. United States law mandates enhanced
23 penalties for crimes against younger children. 18 U.S.C. Sec. 2244 states that maximum
24 prison terms are twice what they otherwise would be when convicts assault children younger
25 than 12 years old.

26 6. Dual criminality exists when two countries outlaw the same conduct with
27 statutes that address “the same basic evil.” *Shapiro v. Ferrandina*, 478 F.2d 894, 908 (2d
28 Cir.), *cert. dismissed*, 414 U.S. 884 (1973). The Supreme Court has noted that dual

1 criminality does not require countries to recognize the same crime with the same name.
 2 Neither does it require that the crime provide the same scope of liability in both countries.
 3 *Collins v. Loisel*, 259 U.S. 309, 312 (1922). Instead, “[i]t is enough if the particular act
 4 charged is criminal in both jurisdictions.” *Id.* Thus, dual criminality concerns the “essential
 5 character” of the acts criminalized by both countries and is found when their laws are
 6 “substantially analogous.” *Theron v. U.S. Marshal*, 832 F.2d 492, 496 (9th Cir. 1987) (citing
 7 *Wright v. Henkel*, 190 U.S. 40, 58 (1903)). *Clarey v. Gregg* held that laws are analogous
 8 when they punish acts of the same general character, such as the taking of another life. 138
 9 F.3d 764, 766 (9th Cir. 1998). This remains the case even when the foreign statute
 10 criminalizes a range of conduct much broader than the complementary U.S. statute. *Id.*

11 7. There is a strong presumption against bail in international extradition cases.
 12 The primary concern in an international extradition matter is to deliver the extraditee to the
 13 requesting nation. The statute that governs international extradition proceedings, 18 U.S.C.
 14 Sec. 3184, makes no provisions for bail. Even if the United States does not consider a
 15 fugitive a flight risk, the fugitive must establish the existence of “special circumstances” that
 16 would warrant bail. *In re Extradition of Molnar*, 182 F. Supp.2d 684, 686 (N.D. Ill. 2002)
 17 (citing *Salerno v. United States*, 878 F.2d 317 (9th Cir. 1989)).

18 8. Examples of such circumstances include the raising of substantial claims upon
 19 which the extraditee has a high probability of success or a serious deterioration of health
 20 while incarcerated. *Salerno*, 878 F.2d at 317.

21 9. However, a heightened standard of proof is required to find special
 22 circumstances. For example, an 86-year-old, bed-ridden man has been ordered held without
 23 bail pending his extradition. *See In the Matter of Extradition of Artukovic*, 628 F.Supp.1370
 24 (C.D.Cal.1986)(stay denied *sub. Nom. Artukovic v. Rison*, 784 F.2d 1354 (9th Cir. 1986).
 25 Similarly, a court did not grant special circumstances on the grounds of a serious health
 26 decline when a man with only one kidney awaited extradition. *See In the Matter of the*
 27 *Extradition of Kamel Nacif-Borge*, 829 F.Supp 1210 (D.Nev. 1993).

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2 10. The actions of which McCabe is accused would be punishable under both
3 United States and Irish law. Thus, the Irish government has met its burden of establishing
4 that McCabe's alleged crimes are ones of dual criminality. Also for this reason, McCabe's
5 arguments regarding dual criminality neither suggest that he has a high probability of success
6 in the extradition proceeding nor present special circumstances that would warrant bail.

7 11. McCabe's medical conditions, to which Dr. Sellman testified and of which
8 McCabe submitted medical record evidence, do not prove that incarceration will induce a
9 serious deterioration in McCabe's health of the kind that would warrant a finding of special
10 circumstances and a continuation of bail.

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Respectfully submitted,

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14 United States Attorney

15 _____
16 /s/ PHILIP J. KEARNEY
17 Assistant United States Attorney
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